(3)

No. 92-1953

Supreme Court, U.S.
FILED
JUL 19 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FREDERIC J. RAYMOND, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONERS' REPLY BRIEF

RODNEY R. PATULA
(Counsel of Record)
THOMAS L. ROBERTS
RICARDO M. BARRERA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 South Syracuse Way, #400
Englewood, Colorado 80111
(303) 771-6200
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
I. ON THE SAME FACTS AND ON THE SAME CLAIMS ASSERTED, THE TENTH CIRCUIT AND THE FIFTH CIRCUIT HAVE ISSUED CONFLICTING OPINIONS ON THE SAME MATTER—ERISA STANDING	1
II. ERISA § 510 PROTECTS THE EMPLOYMENT RELATIONSHIP TO THE EXTENT REQUIRED TO PROTECT THE EXERCISE OF EXISTING RIGHTS UNDER A PENSION PLAN OR TO PREVENT INTERFERENCE WITH THE ATTAINMENT OF A RIGHT UNDER A PENSION PLAN	4
III. ERISA STANDING SHOULD BE DETERMINED AS OF THE TIME OF THE VIOLATION	7
IV. THE ISSUE OF THE RELIEF AVAILABLE IN ERISA § 510 ACTIONS IS THE FLIP SIDE OF THE STANDING ISSUE	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Blackmar v. Lichtenstein, 603 F.2d 1306 (8th Cir. 1979) 8
Chemung Canal Trust Co. v. Sovran Bank/ Maryland, 939 F.2d 12 (2d Cir. 1991) 8
Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir. 1992) ..... *passim*
Coleman v. Champion Intern./Champion Forest Prod., 992 F.2d 530 (5th Cir. 1993) 3
Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975) .. 6
Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992) 7, 8, 9
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 1, 2, 3, 4
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 10
Mertens v. Hewitt, 113 S.Ct. 2063 (1993) 10
Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir. 1990) 5
Morales v. Pan American Life Ins. Co., 914 F.2d 83 (5th Cir. 1990) 6
Raymond v. Mobil Oil Corp., 983 F.2d 1528 (1993) ..... *passim*
Reklau v. Merchants Nat'l Corp., 808 F.2d 628 (7th Cir. 1986) 6
Rhee v. Witco Corp., 762 F. Supp. 211 (N.D. Ill. 1991) 4, 5
Sallee v. Rexnord Corp., 985 F.2d 927 (7th Cir. 1993) 5
Tolle v. Carroll Touch, Inc., 977 F.2d 1129 (7th Cir. 1992) 10
United States v. Burke, 504 U.S. ——, —— S.Ct. ——, 119 L.Ed.2d 34 (1992) 10
Winchester v. Pension Comm., 942 F.2d 1190 (7th Cir. 1991) 8

STATUTES:

ADEA, 29 U.S.C. §§ 621-634 5
ERISA § 404 3
ERISA § 405 3

TABLE OF AUTHORITIES—Continued

Page

ERISA §§ 502(a)(1), (3) 9, 10
ERISA § 502(d)(2) 10
ERISA § 510 ..... *passim*
REA Pub.L.No. 98-397 (1984) 6

OTHER:

Supreme Court Rule 14.1.(a) 10

PETITIONERS' REPLY BRIEF

Respondent's ("Mobil") Brief In Opposition argues that the Tenth Circuit's decision in this case, *Raymond v. Mobil Oil Corp.*, "did no more than explicitly apply this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)" and that "there is no conflict with the Fifth Circuit's decision in *Christopher v. Mobil Oil Corp.*" *Opp.* at 1. Mobil's arguments cannot be squared with the express holdings in both *Raymond* and *Christopher*.

Raymond and *Christopher* are diametrically opposed. Mobil's arguments betray its unwillingness to acknowledge the fundamental difference between the Tenth Circuit and the Fifth Circuit's opinions: the difference *fraud* makes. For the Tenth Circuit, employer fraud is irrelevant to ERISA standing. For the Fifth Circuit, employer fraud cannot defeat ERISA standing. The conflict between the circuits is plain and the issue one of fundamental importance to federal pension law. This Court should decide whether an employer can violate ERISA and simultaneously deprive the employees of standing to redress that violation.

I. ON THE SAME FACTS AND ON THE SAME CLAIMS ASSERTED, THE TENTH CIRCUIT AND THE FIFTH CIRCUIT HAVE ISSUED CONFLICTING OPINIONS ON THE SAME MATTER—ERISA STANDING.

Mobil's assertion that the Fifth Circuit's decision in *Christopher* "only allowed plaintiffs who had retired under *similar* circumstances to replead their Employee Retirement Income Security Act ("ERISA") claims with greater specificity, but expressly did not rule on whether they could prove standing," *Opp.* at 2 (italics added), is disingenuous for two reasons.

First, the circumstances of the two cases are not *similar*, they are *identical*. The ERISA claims in *Raymond* and in *Christopher* are not only the same, they are predi-

cated on the exact same facts, including the allegations of fraud, which even Mobil acknowledges, as it must. *See Opp.* at 3 n.3. Crucially, the plaintiffs in *Christopher*, as did the plaintiffs in this case, took their benefits in a lump-sum when they "retired." [*Cf.* 43a with 15a and 16a].

Nonetheless, and second, the Fifth Circuit in *Christopher* held that it could not "now foreclose the possibility that [the plaintiffs] could prove facts that would create standing for them." [48a]. This is because the Fifth Circuit correctly discerned that:

> [T]he standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend on whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing.

[46a]. In stark contrast, the Tenth Circuit explicitly rejected the Fifth Circuit's approach to standing under ERISA, holding that "the existence of fraud is irrelevant" given that the plaintiffs received "all benefits to which [they were] entitled under the plan." [16a]. The Tenth Circuit also concluded that "the *Christopher* court's 'but for' standing analysis . . . amounts to the kind of analysis rejected by the Supreme Court in *Firestone*." [17a]. Thus, the Tenth Circuit in this case, unlike the Fifth Circuit in *Christopher*, held that regardless of the merits of the plaintiffs' claims, they do not have standing under ERISA to prove anything, including fraud.[1]

---

[1] The Tenth Circuit's holding belies Mobil's argument that *Christopher* and *Raymond* are distinguishable on the basis of what the plaintiffs there could prove and what the plaintiffs here supposedly failed to demonstrate on Mobil's motion for summary judgment. *See Opp.* at 2, 11-12. In fact, Mobil's motion for summary judgment in this case was denied by the district court which held, following *Christopher*, that if the plaintiffs "can prove it [the violation of ERISA by fraud], they have to have a chance to prove it." [78a]. The Tenth Circuit reversed, not on the basis of whether a violation of ERISA could or could not be proved, but strictly on the categorical basis that the plaintiffs were no longer "participants" because they received the full extent of their benefits previ-

The Tenth Circuit's own view of the Fifth Circuit's opinion in *Christopher*, not Mobil's attempt to distinguish the two cases on procedural grounds, is the best evidence of the conflict between the circuits. Misconstruing this Court's opinion in *Firestone, see Pet.* at 14-20, the Tenth Circuit held that the *Firestone* definition of who "may become eligible" to receive a benefit "simply 'excludes . . . former employees who have received a lump-sum payment of all their vested benefits.'" [15a]. The *Christopher* court rejected "the construction of *Firestone* urged by Mobil" there, unconvinced that "*Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases." [44a].

Indeed, the conflict between the Tenth and the Fifth Circuits is intensifying. The Fifth Circuit recently construed its *Christopher* opinion, confirming that an employer's fraud cannot defeat standing to remedy alleged violations of ERISA:

> In *Christopher*, this court *restored* ERISA standing to individuals who *had standing* but were divested of that standing through the ERISA violations of their employer. The employees alleged that they had been wrongfully induced to retire, and but for the ERISA violation, would have continued their employment and plan participation, thereby retaining status to sue under ERISA.

Coleman v. Champion Intern./Champion Forest Prod., 992 F.2d 530, 535 (5th Cir. 1993) (italics in original). In contrast, the Tenth Circuit stated that "[t]o say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing." [17a]. Needless to say, the Tenth Circuit did not then *restore* standing to the plaintiffs, as did the *Christopher* court.

Raymond and *Christopher* cannot be reconciled on the standing question, and the Tenth and the Fifth Circuits

---

ously vested on the date of their "retirements." The *Christopher* case is now proceeding to trial on claims under §§ 404, 405 and 510 of ERISA.

could not be more divergent in their respective constructions and applications of *Firestone* to identical facts and identical claims.[2] Certiorari review is necessary to resolve this conflict on an important issue of federal law.

II. ERISA § 510 PROTECTS THE EMPLOYMENT RELATIONSHIP TO THE EXTENT REQUIRED TO PROTECT THE EXERCISE OF EXISTING RIGHTS UNDER A PENSION PLAN OR TO PREVENT INTERFERENCE WITH THE ATTAINMENT OF A RIGHT UNDER A PENSION PLAN.

Citing *Raymond* [22a], Mobil argues that standing to sue in this case would " 'transform ERISA's statutory scheme into a federal job protection scheme.' " *Opp.* at 12-13. But Mobil is wrong, and the Tenth Circuit's apprehension is unwarranted.

Plaintiffs do not contend that they have the right to continue working so as to accrue a larger pension." *Id.* at 13. Rather, plaintiffs contend that they had the right to be fully informed of their current pension status and to be told that the pension Plan was amended by Mobil to include the waiver provision, as it was in fact amended, and that the amendment with the waiver was in fact adopted *while they were still employees and participants* in the pension Plan. Mobil had a duty to inform the plaintiffs of their true pension status but willfully concealed the true Plan and affirmatively misrepresented that no exceptions to the increased threshold were available, contrary to the pension Plan as it existed when plaintiffs were still employed.[3]

---

[2] Mobil repeatedly argues that *Raymond* correctly applied this Court's opinion in *Firestone*, and that there is no conflict with *Christopher*. *Opp.* at 10-12. In its petition for writ of certiorari to this Court to review the *Christopher* opinion, Mobil forcefully argued that the "Fifth Circuit's 'but-for' standing analysis contravenes ERISA's express statutory definition of 'participant' and rejects this court's decision in *Firestone*." *Petition For Writ of Certiorari*, No. 91-1881 (May 26, 1992) at 7.

[3] *Cases* such as *Rhee v. Witco Corp.*, 762 F. Supp. 211 (N.D. Ill. 1991), cited by Mobil, *Resp. Brief* at 11, 13, and 17, forget that a

Plaintiffs thus contend that they were fraudulently discharged to prevent them from exercising their existing pension rights and for the purpose of interfering with the attainment of pension rights, all in violation of ERISA. Plaintiffs do not contend that they had an absolute right to have the increased threshold waived, only that they had a right to be apprised of and therefore apply for the waiver, which option existed at least four months *before* they left their jobs, never knowing that they could have applied for the waiver.[4]

Nor do plaintiffs seek the opportunity to prove that they had a right to a lump-sum benefit under ERISA

---

sufficient showing of specific intent to interfere with existing rights or the attainment of rights under a benefit plan is required by § 510. Thus, it is not true that " 'if future, unearned benefits were to be deemed "vested benefits" under ERISA, *all* individuals fired from jobs with qualified employee benefit plans would arguably have standing to sue under ERISA for future benefits lost because of their discharge.' " *Opp.* at 13 (*citing Rhee*, 762 F. Supp. at 214 n.1) (emphasis added). Only those plaintiffs, like the present plaintiffs, who can overcome a motion for summary judgment by producing evidence of their employer's specific intent to interfere with their rights under ERISA will have standing to prove that violation of ERISA. *See Sallee v. Rexnord Corp.*, 985 F.2d 927, 929 (7th Cir. 1993), cited by Mobil, *Opp.* at 17 n.13, affirming the district court's dismissal because, among other grounds, plaintiffs there failed to make any showing "that they had been discriminated against" in violation of § 510.

[4] Mobil states that in "the only fully litigated test of the Plan amendments, the Tenth Circuit found that the amendments were justified." *Opp.* at 3 n.3 (citing *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990), reproduced in the Appendix to the petition at 49a-69a). The Tenth Circuit did no such thing. The *Mitchell* opinion, discussing the plaintiff's claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, found only that the plaintiff "did not meet his burden of production on the issue of pretext." [65a]. The Tenth Circuit not only did not find that concealing the waiver provision or misrepresenting the availability of exceptions to the higher threshold were justified, it did not even address those issues at all. *See Raymond*: "The existence of the waiver provision was not discovered by Mitchell in his case until trial was underway. Our decision in *Mitchell* makes no mention of the waiver provision." [4a n.2].

or under the Internal Revenue Code. *Opp.* at 4-5 n.4. Although plaintiffs do allege that certain rights to a lump-sum benefit vested under the Retirement Equity Act of 1984 ("REA"), the fact that a lump-sum retirement benefit may not be mandated by ERISA does not mean that an employer may wilfully conceal an existing *option* concerning an existing benefit. Nor does the fact that the tax-qualification of a pension plan may not provide substantive rights to employees mean that an employer, especially in the face of express inquiries by its employees, as here, can affirmatively misrepresent the status of their Plan benefits or what the IRS did in fact require or how Mobil did in fact change the Plan in response to the IRS's concerns. Thus, Mobil's arguments and cited cases, *e.g.*, *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83, 87-88 (5th Cir. 1990), *Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628, 631 (7th Cir. 1986), *Craig v. Bemis Co.*, 517 F.2d 677, 685-86 (5th Cir. 1975), are inapposite. Plaintiffs contend that they had a right to be timely informed of an existing Plan option in order to apply for it. Mobil had an affirmative duty, as Plan fiduciary, to disclose the option. Mobil presents no arguments against these contentions.[5]

Indeed, Mobil's own counterstatement of the facts reveals its continuing attempt to obscure the relevant facts. The November 23, 1983 IRS favorable determination letter did not expressly state that the Plan amendment date was June 13, 1984. *Opp.* at 4. That date was merely referenced in the letter's form caption while the body of the letter referred to Mobil's proposed amendment of October 4, 1984, which Mobil admits it never disclosed to its work force. Further, Mobil's insinuation, *Opp.* at 4, that its December 21, 1984 announcement of the IRS approval included mention of the waiver is

---

[5] With regard to the plaintiffs' rights under the REA, effective on July 30, 1984, Mobil has no argument against the Tenth Circuit's holding that Mobil "did not in fact adopt the plan with the waiver provision until September, 1984." *Raymond* [7a n.6].

frankly misleading. Mobil's December announcement makes no mention of the existing waiver provision, and Mobil has no argument explaining that fact away.

Invoking ERISA's goal of protecting benefits, Mobil then further mischaracterizes the facts and the record by arguing that plaintiffs merely claim that they would not have retired had they been informed of the "future" availability of "new" benefits. *Opp.* at 15. This feint cannot withstand the undisputed fact that the otherwise concealed waiver option was an *existing* plan benefit, not a future or contemplated, new benefit. Mobil concedes that the waiver provision was proposed and adopted before the plaintiffs (involuntarily) retired. *See also and compare, Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992).

Mobil's attempts to recast the claims below as predicated on some nebulous right to continue to work so as to accrue further benefits are but a smokescreen to hide the fundamental conflict between *Raymond* and *Christopher*: that fraud is "irrelevant" and makes no difference in the Tenth Circuit but cannot be hidden behind in the Fifth Circuit to defeat ERISA standing. This fundamental issue of federal law warrants this Court's attention.

III. ERISA STANDING SHOULD BE DETERMINED AS OF THE TIME OF THE VIOLATION.

Mobil argues that to determine standing according to participant status "at the time of the alleged violation of ERISA . . . is at odds with the unambiguous language of the statute." *Opp.* at 16. Mobil errs, however, in stating that all of the relevant provisions of ERISA "depend on a person's present rather than past status." *Id.* A "participant" for purposes of ERISA expressly includes "former employees." A claim to redress a discharge in violation of § 510 is, by definition, brought by a former employee concerning a past event.

Further, such a claimant could allege that her discharge was for the purpose of interfering with the *attainment* of a right under her pension plan. Such a claimant, there-

fore, could have received all benefits to the date of her discharge, yet still have been discharged to prevent the attainment of a benefit. In that instance, the claimant necessarily is not in possession of the benefit—because it has not yet accrued or vested—on the date of discharge. Such a claimant is not a "current participant" who is eligible for benefits or who may become eligible for benefits under the Tenth Circuit's test. With standing to redress the discharge, however, she might become eligible for further benefits. She has a colorable claim that she will prevail in a suit for benefits—i.e., a suit proving that her employer discharged her for the purpose of interfering with her attainment of a right under her plan.[6]

Thus, the Tenth Circuit erred in holding "that current participant status is the relevant test." [13a]. The Tenth Circuit's current participant test cannot embrace the foregoing example, which illustrates how the category of "former employees" [14a] can also include "former participants." With that understanding of ERISA § 510, the Tenth Circuit's reading of *Drennan*, is not persuasive. *Opp.* at 17-18. The *Raymond* court stated that "[i]n *Drennan*, the Sixth Circuit held that employees who were eligible for a certain benefit payout were participants for ERISA purposes. . . ." [14a n.11]. But the Sixth Circuit

---

[6] Even *Winchester v. Pension Comm.*, 942 F.2d 1190 (7th Cir. 1991), which Mobil cites for the proposition that "a plaintiff *must* be a 'participant' at the time a lawsuit is filed in order to sue under ERISA," *Opp.* at 17 (emphasis added), held that "[t]here may be some merit to the argument that a former employee who had already received vested benefits should be allowed to bring an action within a reasonable time against the [plan] administrator for failure to provide information. . . ." 942 F.2d at 1193. Also, in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 15 (2d Cir. 1991) (citing *Blackmar v. Lichtenstein*, 603 F.2d 1306 (8th Cir. 1979)), cases cited by Mobil, *Opp.* at 17, the court specifically noted that while a former fiduciary has no standing to sue, "'[a]dequate protection is afforded the beneficiaries under Section 502.'" Here, in contrast, there is no one else with standing to *redress* the alleged violation of ERISA. The plaintiffs here must have standing to vindicate their rights under ERISA.

held that "[t]he class members were eligible for such a plan [benefit] at the time the asserted breach of fiduciary duty occurred and had no future eligibility requirements to fulfill." *Drennan*, 977 F.2d at 250. So, too, were the plaintiffs here eligible for the waiver option at the time the asserted fraudulent concealment of the plan option occurred. Plaintiffs were eligible then and the option existed then; they also had no further requirements to fulfill. In fact, the waiver option was specifically required for those employees of their particular pension status.

In *Drennan*, "[s]ince the Class was eligible to participate in the employee benefit plan, its members had standing" to bring suit under ERISA. *Id.* This was true even though the *Drennan* court acknowledged that, as of the time of suit, the plaintiffs there were "*no longer* eligible since [they] had accepted [an alternative option] and terminated employment with GM." *Id.* at 248 (emphasis added). Mobil is wrong, therefore, in arguing that the *Drennan* plaintiffs "were indisputably 'participants' at the time they brought their lawsuit." *Opp.* at 18. As in *Drennan*, the plaintiffs here were also eligible to participate in—apply for—the waiver option, even though they took the lump-sum option within the "window" period and terminated employment with Mobil. They, too, must have standing under ERISA, as the Fifth Circuit recognized and as the Sixth Circuit would undoubtedly recognize consistent with *Drennan*.

IV. THE ISSUE OF THE RELIEF AVAILABLE IN ERISA § 510 ACTIONS IS THE FLIP SIDE OF THE STANDING ISSUE.

Mobil argues that the only issue on appeal to the Tenth Circuit "was whether petitioners had standing to sue under ERISA, not the relief available if they had standing." *Opp.* at 18. But the rationale underlying the Tenth Circuit's limited view of standing is that ERISA protects benefits only—not the employment relationship, even indirectly. Indeed, the court posits that § 510 is enforceable under § 502(a)(1)—the benefits recovery

provision—but does not even mention § 502(a)(3)(B) —the provision authorizing "appropriate equitable relief." (That ruling is itself diametrically contrary to *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir. 1992)). Then, the Tenth Circuit reasons that a suit for benefits not earned is not a suit for benefits under § 502 (a)(1), but rather a suit for "damages" [15a] which, according to the Tenth Circuit, takes the claim outside ERISA. Consequently, the issues of standing and the enforcement provisions available to the § 510 plaintiff are inseparable under the Tenth Circuit's analysis.

Significantly, under the Tenth Circuit's analysis, Mr. McClendon was suing for "compensatory damages" in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). He had not yet vested in the benefit at issue and thus could not sue for an earned but unpaid benefit. According to the Tenth Circuit, he could sue only for "damages" and thus would lack standing to sue under § 502(a)(1). *See especially and compare, Opp.* at 10 n.9 with 14. But Mr. McClendon, under § 502(a)(3)(B), like the plaintiffs here, should have standing to seek "appropriate equitable relief"—reinstatement and restitution, including back pay and lost benefits—to redress his employer's alleged violation of § 510. *Mertens v. Hewitt*, 113 S. Ct. 2063 (1993); *United States v. Burke*, 504 U.S. ——, —— S.Ct. ——, 119 L.Ed.2d 34 (1992); *see also*, § 502(d)(2) [83a].

Consequently, the third issue plaintiffs proposed for review is inextricably bound up with the two "pure" standing issues identified in the petition.[7]

CONCLUSION

Plaintiffs' petition for writ of certiorari should be granted.

---

[7] *See also Supreme Court Rule*, 14.1.(a): "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein."

Respectfully submitted,

RODNEY R. PATULA
(Counsel of Record)
THOMAS L. ROBERTS
RICARDO M. BARRERA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 South Syracuse Way, #400
Englewood, Colorado 80111
(303) 771-6200
Counsel for Petitioners

July 19, 1993